Grand Trunk Railway Company of Canada, defendants.

In the Superior Court,

MONTREAL.

ALFRED MORRISON,

Petitioner.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

Defendants.

REPORT OF ARGUMENTS HEARD AT MONTREAL, BEFORE

MR. JUSTICE MONK,

ON THE 23rd, 24th, AND 25th OCTOBER, 1861.

REPORTED BY JAMES KIRBY, B. A.,

STUDENT-AT-LAW.

TORONTO:

HENRY ROWSELL, LAW PUBLISHER.

1861.

ROWSELL & ELLIS, PRINTERS, TORONTO.

EDITORIAL NOTE.—The case of "Morrison v. The Grand Trunk Railway Company of Canada," as reported in the following pages, is a suit instituted in the Province of Lower Canada, to determine three questions :—

1. Whether the preference bondholders of the Grand Trunk Railway Company are entitled to a charge, hypothec mortgage, and lien of the same nature and extent as that which this Province formerly had.

2. Whether this charge, hypothec mortgage, and lien extended to the rolling stock and plant, and that consequently the charge hypothec, mortgage, and lien, created in favour of the first preferential bondholders by the Act of 1856, also comprises the same property.

3. Whether the preferential bondholders are entitled to have a *Sequestre*, or Receiver and Manager, of the railway, appointed, by whom the said railway may be worked and managed.

A proceeding having for its object the determination of the same questions is already commenced, and is now pending in the Court of Chancery in Upper Canada, and will in a few days be brought on for hearing.

The cause as reported in the following pages came on for hearing in Lower Canada, at Montreal, before Mr. Justice MONK, on the 23rd, 24th, and 25th of October, 1861. The plaintiff, in the interest of the first preferential bondholders, was represented by the following counsel, the Hon. L. T. Drummond, Q. C., the Hon. A. A. Dorion, Q. C., and Mr. A. Robertson.

The company were represented by Mr. J. W. Ritchie, and Mr. Pominville.

Mr. Strong, of the Equity Bar of Upper Canada, Mr. William Pare, of London, England, as agent for preference bondholders, and Mr. Snelling, from the office of the plaintiff's Upper Canadian solicitors, were also present watching the case on the part of the preference bondholders. Mr. Alexander McDonald, of the Equity Bar of Upper Canada, was likewise present, watching the case on the part of the company.

The respective arguments of each counsel engaged in the case have been submitted to them respectively for revision, and have been revised by them.

Toronto, 2nd November, 1861.

In the Superior Court, Montreal,

BEFORE MR. JUSTICE MONK.

ALFRED MORRISON,

Petitioner.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA,

Defendants.

Reported by JAMES KIRBY, B.A., Student-at-Law.

FIRST DAY.

23RD OCTOBER, 1861.

Mr. A. ROBERTSON opened the case for the Plaintiff, and stated in effect that the petition was filed by a preferential bondholder, of which the conclusions were to the effect:—

1. That it be declared that as such bondholder, the petitioner was entitled to a first hypothec, mortgage, and *lien* upon the railway, tolls, and rolling stock of the Company, and to have the road worked and the tolls and profits applied to the payment of interest on the preferential bonds and other debts of the company, according to their legal rank and priority.

2. For the recovery of £636 sterling, interest due in January last, upon bonds for £10,600 held by the plaintiff.

3. That it be declared that by reason of the Provincial Statutes cited, and the nature of the rolling stock as *immeubles par destination*, such stock could not be sold by the Sheriff nor could the road itself.

4. That a *Sequestre* or receiver be named by whom the railway should be worked and the tolls and revenues received,

and the net proceeds, after deduction of working expenses, returned into court for distribution, under the order of the court, to the various creditors according to their rank and priority.

5. For such other relief as might be necessary.

The petitioner set forth:—

The Provincial Statutes under which the government guarantee was given;—the statutes incorporating the roads forming part of the Grand Trunk Company;—the agreement of union between the various companies which was filed and admitted;—the statute ratifying the union;—the issuing of £2,000,000 of bonds under the act of 1856;—that the plaintiff is owner and holder of £10,600 of such preferential bonds, transferable by delivery, on which arrears of interest had accrued; that the security of the preferential bondholders rested mainly on the efficient working of the road and the application of the tolls and revenues to the payment of interest on such bonds; that this security would be greatly impaired by the sale of the road and of rolling stock, plant, &c., which were *immeubles par destination;* that the rights of the plaintiff would be destroyed if he were forced to file oppositions *afin de conserver* on the proceeds of any sale by the sheriff; that the interest on all the preferential bonds was over due; that the company was in embarrassed circumstances and largely indebted, and large judgments obtained against them; and that the revenues, tolls and profits of the road, instead of being applied to the payment of the interest due to the preferential creditors, were applied to pay common and unprivileged creditors; and that under the present management the preferential creditors were exposed to the danger of losing their security.

The plea was a "general issue."

Mr. *Robertson* then referred to the various statutes set up in the declaration, namely:—The statute of 1849, 12 Vic, ch. 29, which provided for a "guarantee of interest on loans to be raised by any company for the construction of a line of railway not less than 75 miles in length, within this province;" and enacted "that the payment of interest guaranteed by the province shall be the first charge upon the tolls and profits of

the company;" and also, "that the province shall have the first hypothec mortgage and lien upon the road, tolls, and property of the company for any sum paid or guaranteed by the province, excepting always the hypothec mortgage or lien of holders of bonds, or other securities on which interest is guaranteed by the province, for the interest so guaranteed, and the principal on which it shall accrue."

The Railway Clauses Consolidation Act, of 1851, sections 7 and 9.

The statute of 1851, 14 and 15 Vic., chap. 73, providing for a Main Trunk Line of railway throughout the whole province, and providing that the guarantee might be extended to the "payment of the principal of the sum guaranteed as well as the payment of the interest thereon," and that "for the principal and interest of such bonds the province shall have the same priority of hypothec mortgage and lien upon the railway, tolls, and property of the company, as by the said act, (of 1849) is given for sums paid or guaranteed by the province, and subject to the same provisions."

The Act of 1852, 16 Vic., ch. 37, incorporating the Grand Trunk Company, and providing (section 28) that the government guarantee should not be given to the Grand Trunk to an extent exceeding £3,000 per mile, and that £40,000 stg. per mile might be advanced so soon as it was ascertained by an engineer of the government "that £100,000 stg. has been actually, and with due regard to economy, expended on the said railway by the said company, in work or materials delivered on the ground, or both conjointly, and whenever it shall be ascertained in like manner that another sum of £100,000 stg. has been so expended as aforesaid, then the guarantee of the province may be given for another sum of £40,000 stg., and so on *toties quoties*, until such guarantee shall have been given to the whole extent hereby before limited; provided always that such guarantee shall, except in so far as otherwise provided by this section, be subject to all the provisions of the act first cited in this section, as amended by that secondly cited therein, and may, under the provisions of the twenty-second section of the act last mentioned, be given by issuing and delivering to the said company provin-

cial debentures for the amount to be guaranteed in exchange for the bonds of the company, to which bonds all the provisions of the said section, and of the said acts shall apply."

The act of 1852, 16 Vic., ch. 39, permitting the union of companies forming part of the Main Trunk Line, under an agreement such as is mentioned in the act. This statute contains the following clause, (section 5): "Provided always that the rights of the province, or of Her Majesty on behalf of this province, under any guarantee given to any such company or otherwsse, or of any person or party having any special hypothec or privileged claim upon the lands, buildings, tolls or other property of either of such companies, or upon any part thereof, shall not be impaired by such purchase, and the company shall keep separate accounts with respect to each railway, so as to ascertain the property or moneys upon any such hypothec or privilege shall attach."

The act of 1854, 18 Vic. ch. 33, amending the acts relating to the Grand Trunk Company, and ratifying the agreement made between that company and the various companies forming part of the Main Trunk Line. This act (sect. 20) enacts, that inasmuch as it would be more convenient that instead of the particular charges on the several railways in respect of bonds, "one general charge should be created upon the Grand Trunk Railway of Canada, to the extent of the whole amount of the debentures of the province, issued or to be issued: be it therefore enacted, that the Crown shall, on behalf of the provincial government, have in respect to the debentures issued, or to be issued, as aforesaid, a charge, hypothec or lien upon the whole Grand Trunk Railway of Canada, in the same manner and with the same preference and privilege, and to the same extent and with the same incidents as to redemption or otherwise, as, but for such amalgamation the provincial government would have had upon the separate railways or undertakings, in respect of which, by the said several acts respectively, such debentures were to be issued; and it shall not be necessary for the said company to make, or keep separate accounts with respect to each undertaking forming part of the said Grand Trunk Railway."

The act of 1855, 18 Vic., ch. 174, "for granting additional

aid by loan to the Grand Trunk Railway Company," authorising the issue of provincial debentures to the extent of £900,000 sterling. By this statute it is enacted, section 2: "the sums advanced as a loan, under this act, shall be a first charge hypothec and lien in favour of the Crown on behalf of the provincial government, and upon the whole amalgamated Grand Trunk Railway of Canada, and upon all the railway, works, and property, forming part thereof, or now belonging or hereafter to belong to the said company, and shall be payable at a period not exceeding twenty years from the passing of this act, the interest thereon at six per cent. per annum being payable by the said company to the Crown, for this province, half yearly, at such times as the governor in council shall appoint:" and by sec. 3 it is provided "the said charge, hypothec and lien, in favour of the Crown, shall have the same preference and privilege, and shall be subject to the same incidents, as to redemption and otherwise, as the charge, hypothec and lien in favour of the Crown, for claims arising out of the provincial guarantee, or advances in place of the provincial guarantee, under any former act or acts authorising such guarantee or advance."

The act of 1856, 19 & 20 Vic., ch. 111, to grant additional aid to the company, which enacts, section 1: "The said company shall be authorised to issue preferential bonds to the extent of two millions of pounds sterling. The holders of such bonds to have priority of claim therefor over the present first lien of the province." This act provides that the proceeds of the bonds shall be expended on the portion of the roads mentioned, and on the Victoria Bridge to the extent mentioned in the act.

The act of 1857, 20 Vic., ch. 11, which enacts, (sect. 4,) that on condition that the company should complete their road and supply the railway with sufficient plant, "and so long as they maintain and work the same regularly, the province foregoes all interest on its claim against the company until the earnings and profits of the company, including those of the Atlantic and St. Lawrence Railroad Company, shall be sufficient to defray the following charges: 1. All ex-

penses of managing, working and maintaining the works and plant of the company. 2. The rent of the Atlantic and St. Lawrence Railway, and all interest on the bonds of the company, exclusive of those held by the province. 3. A dividend of six per cent. on the paid up share capital of the company, in each year in which the surplus earnings shall admit of the same."

The act of 1858, 22 Vic., ch. 52, amends the acts relating to the Grand Trunk Company, and provides for the increase of its capital, by preferential bonds, which should be deemed preferential bonds under the act of 1856, or by other bonds not preferential or by mortgage, or by the issue of new shares. "Provided always (sect. 3) that nothing herein or hereinafter contained shall in any way alter, affect, postpone or prejudice the claim of the province upon the said undertaking, or the obligations of the company towards the province, as settled by the provisions of the several acts now in force relating to the said company."

It was contended :—

That under these statutes the province had preserved its priority of claim for the guarantee. That the words used were applicable to the law in force in both sections of the province, and were intended to give the security known in the French law by the term *hypotheque*, which was applicable to immoveable as "*gage*" to moveable property. The term "mortgage," unknown in French law, was put into the French version of the original act of 1849, without being translated, and was applicable to Upper Canada, importing in some sense a conveyance, with peculiar rights known to the English law. The words "*lien*," in the French version, and "*privileges*" was used to convey the security known in the English law by that term, and although under the French system *lien* was not perhaps adequately rendered by *privilege*, but partook also of a right known to our law as a *droit de retention*, yet the meaning of the legislature could not be misunderstood. By these words, and by the terms "charge," "priority of claim," "preferential bonds," the province intended to obtain all the security it could, over the road and plant of the company, in case of being called upon to pay the holders of the bonds.

That under the statutes the *hypotheque* and lien extended over the plant and rolling stock of the company. This seemed plain from the words in the original act of 1849, giving a *hypotheque* mortgage and lien over the "road, tolls and property of the company." To construe property so to mean only immoveables or the road-bed and permanent works, was to restrict its signification both in a common and legal sense. In addition to this, by the act of 1851, 14 & 15 Vic., ch. 73, the mortgage, hypothec and lien was declared to be "upon the railway tolls and property of the company," and by the same statute (section 24) it was enacted "that the word railway in this act shall include all viaducts, bridges, station houses, depots and other works, machinery, engines, vessels, carriages and things of every kind which may be necessary or convenient to the making or using of any railway."

This definition was explicit and general in its terms, and might fairly be held to be a recognition by the legislature, of its intention that the security should attach to viaducts, bridges, carriages, &c., as part *of the property* of the company.

The statutes provided for the advance by the government of the £40,000 sterling, so soon as the company had expended £100,000, "in work or materials delivered on the ground." (See 16 Vic., chap. 37, sec. 28.) In the act of 1854, 18 Vic., ch. 33, sec. 20, the £100,000 was to be shewn as expended in work done or materials delivered on the ground, "*or rolling stock provided* since the 1st of July, 1853." As these materials and rolling stock were delivered and furnished, they became subject to the rights of the government, and formed part of its security.

That by the act of 1852, providing for the union of the various companies, individual creditors were recognised as having privileged rights on the moveable property of the several companies before their union. (See 16 Vic., ch. 39, sec. 5.) "Provided always, that the rights of the province, or of Her Majesty on behalf of this province, under any guarantee given to any such company, or otherwise or of any person, or party having any special hypothec, or privi-

leged claim upon the lands, buildings, tolls, or other property of either of such companies, or upon any part thereof, shall not be impaired by such purchases, and the company shall keep separate accounts with respect to each railway, so as to ascertain the property or moneys upon any such hypothec, or privilege shall attach."

That if such rights existed in favour of individuals, not only on the lands and buildings, but on the "tolls and other property" of the several companies it might be inferred that the government had, or might have had, rights equally extended. This inference was legal and reasonable.

That if the lien of the province were admitted, the preferential rank claimed for the bond-holders could not be denied. The act of 1856 expressly says—"The holders of such bonds to have a priority of claim therefor over the present first lien of the province."

That the acts of 1857 and 1858 did not interfere with this priority.

Reference was then made to English cases to shew the powers of the Court of Chancery in England; the powers and duties of receivers when named, and the rights and remedies of creditors holding mortgages or equitable liens: 1 Maddock, Chan. Prac. p. 134; 2 Maddock, pp. 233, 234, 237; 35 Law and Equity Rep. 37; Carron Iron Company v. McLaren; Ames v. Trustees of the Birkenhead Docks; 1 Jurist N. S. p. 529; Tatham v. Parker, Jurist 1855, p. 992; Fripp v. Chard Railway Co., 17 Jurist p. 888; Pardoe v. Price, 13 Mees. and Welsby p. 284; 1 Shelford, Railways Am. Ed. p. 822; Jortin v. S. E. Railway Co., 1 Jurist N. S. p. 432, and 4 Jurist N. S., p. 467; Angel and Ames on Corporations, p. 703; Potts v. Warwick and Bir. Canal Co., 1 Kay p. 142; South Yorkshire R. Co. v. Great Northern Co.; 19 Eng. Law & Eq. Rep., p. 519; Russell v. East Anglian Railway, 14 Jurist, p. 967 and p. 1033, and 6 Eng. Law & Eq. Rep., p. 137; Corry v. Londonderry & Enniskillen Railway Co., 7 Jurist N. S., p. 508.

It was conceded that these English case were not authority in Lower Canada, nor were the English statutes by any

means so extensive in their terms as the Canadian statutes.

By the English acts only tolls and profits are usually allowed to be mortgaged.—Railway Clauses Acts of 1845; Redfield on Railways, p. 572, 573. In the case of Russell v. The East Anglian Railway Company, the appointment of a receiver with powers over the rolling stock was evidently too extensive, and it would not be contended here that the statutes referred to in that case were analogous to the Canadian statutes so far as respects the plant of the road. In that case also the court was by no means satisfied that the appointment had been obtained in good faith.

As to Corry's case, it was a case between shareholders, and was not at all applicable to this case.

The following Canadian cases were referred to.—Simpson v. Ottawa and Prescott Railway Company; Brantford v. Grand River Navigation Company; Herrick v. Grand Trunk Company. Herrick's case was decided in June, 1861, and was brought by a shareholder who sought to have the earnings of the road applied, after payment of working expenses towards the purchase of rolling stock and payment of the floating debt of the company, before any payment was made towards the interest on the preferential bonds. The bill was dismissed, and the judgment of *V. C. Esten* went strongly to support the prayer of the present plaintiff, as appeared from the judgment, which was as follows:—

"It appears to us that the situation of the preference bondholders is clear. Their position and their rights have been well defined by the acts. His Lordship then referred to and quoted from 12 Vic., ch. 29, which gave the Crown the lien for interest—18 Vic., ch. 174, which extended that lien to principal as well as interest.—19 & 20 Vic., ch. 111, which authorised the issue of the preference bonds, to the extent of two millions of pounds sterling, the holders of such bonds to have priority of claim therefor over the present first lien of the province. As bondholders merely they have no lien, but by this enactment their lien (for they get the lien which the government already possessed) *attaches to the whole property of the company present and future, for principal as well as interest.*"

"The rights of the preference bondholders thus created are not impaired by any subsequent enactments; and in my view the act 22 Vic., ch. 52, rather confirms those rights.

"Now, the object of this suit is to restrain the directors from paying the interest now due and unpaid on the preference bonds. Apart from the acts of parliament, this court has no power to interfere. This court must decide the questions which are raised upon these pleadings according to the several acts of parliament which bear upon the subject; and if we refer to those acts, as we have done, we find it clearly expressed *that the preference bondholders are in the position of preferred creditors, having a lien upon the road and all the works and property of the railway.* Then again, on looking at those parts of the acts which have been cited as describing the order of distribution of the earnings of the road, we do not find that in those acts the rights of the bondholders are in anywise impaired. There is no doubt in my mind but that the bondholders can institute a suit to restrain the directors from applying the earnings of the road in any other way than in the order appointed by the acts. This case is to be distinguished from Corry v. Londonderry and Enniskillen Railway Company."

As to the American decisions, it was contended they would be found to sustain the pretentions of the plaintiff, and might be referred to as shewing the opinions held there in analagous cases. They were to be found in Redfield's Book on Railways, acknowledged in America as the best treatise on the subject. The author in the edition of 1858, page 590, states that in a case where the statute authorised the directors to make a mortgage of the existing property of the company, and its corporate rights and franchises, and of the railway itself or the entire undertaking, that the trustees under such a mortgage would hold subsequently acquired property as an incident to the franchise mortgaged, and as an accession to the subject of the mortgage.

"So in a recent case before the Supreme Court, N. Y., The Farmer's Loan and Trust Company and the attaching creditors of the Fleesburg Railway, 10 American Railway Times,

No. 10, 20, Law Reports 678, it was decided on argument and elaborate examination, that the rolling stock of a railway such as cars, tenders and locomotives, is accessory to real estate, and passes by deed as a fixture or necessary incident; that railway mortgages including the rolling stock, need not be filed as chattel mortgages, and that bondholders under a mortgage not so filed, are entitled to the rolling stock as against judgment creditors." *Strong*, J., said, "The property of a railway company consists mainly of the road-bed, the rails upon it, depot erections, the rolling stock, and the franchise, to hold and use them. The road-bed, the rails fastened to it, and the buildings at the depot are clearly real property. That the locomotives, and passenger, baggage, and freight cars, are a part, and a necessary part, of the entire establishment, there can be no doubt; for they are so permanently and so inseparably connected with the more substantial realty as to become, constructively, fixtures. Railways being a modern invention, and of a novel character we have no decisions on this question, and those relating to and governing old and familiar subjects do not absolutely control us, although we must necessarily resort to them as guides."

In Williamson, Trustee v. New Albany and Salem Railway, U. S. Circuit Court, October 26th, 1857, 9 American Railway Times, where a bill was filed founded on the nonpayment of an instalment of interest and the embarrassed state of the company, it is established, "That when property is purchased and placed upon the road, no lien being taken by the seller, it becomes subject of the mortgage lien on the road, so that it is not liable to an execution except under the mortgage; and existing liens on the road, under the mortgage, can only be admitted by a court of equity.

In Ludlow v. Hard, in the Superior Court, Cincinnati, Ohio, where a mortgage similar to that referred to was made, *Storey*, Justice, said, "Whatever is added to the original structure becomes a part of it, and cannot be severed from it, and if the security of the mortgage is to continue to be of any value during the period that may transpire before the bonds become due, it must depend upon the implied covenant

of the company to keep it in running order, if they can earn the necessary sums to keep it in running order; and, if they can earn the necessary sums, to discharge the accruing interest and eventually indemnify creditors for the principal debt. By the transfer to the plaintiff we must hold, then, that a permanent right to all additions made to the railway subsequent to the date of the deed was vested."

Mr. Redfield, although he does not seem disposed to go so far as to declare the rolling stock of a railway a fixture, says, "As between the mortgagor and mortgagee, and all subsequent incumbrancers having knowledge of the prior claim, there is no difficulty in allowing the rolling stock of a railway to constitute part of the mortgage of the road, and that to include the renewal of stock from time to time and even additions (see note page 590.) In this case such notice in a public statute was a notice to all classes of creditors.

As to the French law on the subject of moveables being considered as immoveables by accession, or by destination, it would be treated by Counsel who were to follow, as well as the question as to the powers of the court to grant the remedy sought for by the plaintiff.

As to the jurisdiction and powers of the court he, Mr. *Robertson*, referred to the consolidated statutes of Lower Canada, page 668, "The said Superior Court has full power and jurisdiction, and is competent to hear and determine all plaints, suits, and demands of what nature soever, which might have been heard and determined in the courts of *Prévôté*, *Justice Royale*, *Intendant*, or Superior *Conseil*, under the government of the province, prior to the year 1759, touching rights, remedies, and actions of a civil nature, and which are not specially provided for by the laws and ordinances of Lower Canada, made since the said year 1759, and the said Superior Court is competent to award and grant all such remedy as may be necessary for effectuating and carrying into execution the judgments thereof made in the premises aforesaid, and which to law and justice appertain. But nothing in this act shall extend to grant to the said Superior Court any powers of a legislative nature possessed by any court prior to the conquest." 34 Geo. III., ch. 6, sec. 8.

By the ed. of April, 1663, the Superior Council (*Conseil Superieur*) of Quebec was created, and was to be composed of the governor, the bishop of Petrea, or first ecclesiastic in Canada, and five councillors chosen by them annually, and of the attorney-general. It is therein declared:—

"Avons én outre audit conseil souverain, donné et attribué, donnons et attribuons le pouvoir de connaitre de toutes les causes civiles et criminelles pour juger souverainment et én dernier ressort selon les loix et ordonances de notre Royaume, et y procéder autant qu'il le pourra en la forme ét maniére qu' il se pratique et se garde dans le ressort de notre parlement de Paris."

Also to regulate the expenditure of public moneys. the trade in pelleteries, and all matters of police, with power to name judges, clerks, notaries, bailiffs, and other officers as they might judge fit. 1 Edit. and Ord., p. 38.

By the edict of May, 1667, the Court of Prêvoté of Quebec as established "pour comnaitre en premier instance de toutes matièrs tant civiles que criminelles," with an appeal to the Superior Council.

He submitted that the court here had not only the powers of a court of law, but of a court of equity also. The powers of the courts in England as to the writs of *mandamus quo warranto*, and *prohibition*, and *scire facias* had been recognised by the statute of 1849, 12 Vic., ch. 41, and simple modes of procedure provided for giving effect to them, but in reality all these powers were inherent in the court, and had constantly been exercised long before that statute.

It was true that by the course of practice in our courts in ordinary cases, *hypothecary* creditors must look after their own interest, and bid up the property hypothecated at sheriff's sale, and afterwards file their opposition *à fin de conserver* on the moneys when returned into court. So with creditors having a privilege on moveables as the landlord for rent, his former right to stop the sale by opposition having been converted into an opposition *à fin de conserver*. A *creancier Chirographaire* may sell the immoveables, property of his debtor, no matter how many hypothecs might attach to it, and the sheriff's sale purged

all *hypotheques*. Since the recent statute, 23 Vic., ch. 59, (Consolidated Statutes L. C. page 338,) opposition *à fin de conserver* need not be filed inasmuch as the sheriff obtains from the registrar a certificate of all hypothecs for ten years previous to the sale, and returns it into court with the moneys, so that the debts as well the rank of the *hypothecary* creditors may be determined on by the court. Thus any creditor who obtained a judgment might bring the debtor's property to sale. If an immoveable could not be sold in parts, a creditor for ten pounds might bring to sale property worth thousands. If we have only the ordinary remedy by sheriff's sale, the preferential creditors must stand by and see their security taken from them by judgment creditors having no pretence to a privilege or lien; or must buy off the judgment creditors; in fact pay all the floating debt of the company. This could not have been contemplated by the statutes, which in giving a "privilege" must be held as impliedly giving a remedy to render such "privilege" effectual.

The remedy by sheriff's sale, it was submitted, could not reasonably be applied to railroads, even if railroads could be sold by the sheriff, for it was evident that purchasers (*adjudicature*) could not be found for large undertakings, especially for such a road as the "Grand Trunk." The interests of all classes of creditors would be sacrificed. The company would practically be dissolved, and public and private interests destroyed, and the just expectations of creditors in this country, and at home, founded on the good faith of the province frustrated.

Mr. DORION commented at length, first, on the question of lien or priority, and on the various clauses of the statutes as shewing the rights of the province, and the priority of the plaintiff's claim as of the preferential bondholders. Second, as to the extent of the plaintiff's lien and as to what property was subject to it. On this point, he submitted that all the rolling stock was by the French law considered *immeubles par destination*, and were subject to the lien of the plaintiff. Moveables became *immeubles* either by "incorporation or by destination." So, water-pipes in a house were given as an ex-

ample of immobilisation by incorporation and by destination.

Pothier, Traité de la Communauté, Nos. 60 & 61. 1 Teulet, Commentaire sur le Code, p. 124. "Le pressoir est réputé immeuble, quoique les pieces qui le composent peuvent facilement se désassembliés; il est *accessoire* de l'héritage à l'exploitation du quel il sert, et la destination est marquée. C'est toujours le même principe qui décide."

1 Bourjon, Ed. 1770, p. 90.—So "Ustensils d'Hotel mis pour perpetuer la demeure." Coutume de Paris, art 90. "Fish in a pond," art. 91.

In 8th Loiré p. 54, the rule is laid down as follows:—"Pour déterminer si un objet doit être ou non considérée comme immeuble, il faut rechercher sa destination."

By modern legislation, horses employed in a mine or out of the mines if for hauling up the mineral, are *immeubles par destination.* "Cependant on pourrait distinguer et ne déclarer immeubles que les bêtes de somme nécessaires á l'activité de la mine, ce qui ne comprendrait pas celles employées á voiturer le minerai do la fosse, au lieu de la vente."

"La condition pour que ces objéts soient immobiliers, est qu 'ils servent à l'exploitation."

1. Pierret L'Allier, Traité sur les mines, p. 173, 174. Immeubles par destination include "tout ce qui est directement attaché au service de l'exploitation." Same p. 429. But it must be a "service exclusif," p. 431.

The reason given for considering horses, instruments and utensils used in mines as immoveables, and for not permitting them to be seized under execution, is that the sale would stop the work. "Arreterait tout à coup l'exploitation et causerait des pertes irréparables."

2. Delbecque, Legislation des Mines, p. 428.

Mr. Dorion contended that this reason was most applicable to the whole of the rolling stock of a railway company; that both in France and in the United States, the rolling stock had been considered as part of the railway, and he cited on this point, Dalloz, Recueil-Périodique, year 1851, part 3, p. 49; 2 Troplong, Priv. & Hyp. No. 339; Redfield on Railways, p. 591.

The third point Mr. Dorion urged was, that the road was inalienable, that the ordinary remedy which creditors had against the estate of their debtors could not ensure to the plaintiff who was entitled to another remedy at the hands of the court, and he referred to Ferraud-Geraud, Legislation des Chemins de fer, Nos. 13, 14, 17 & 21; Redfield on Railways, p. 57), 589, 590 & 591; Dalloz, Recueil-Périodique, 1851, part 8, p. 49 & 50; Dalloz, Recueil-Periodique, 1851, part 5, p. 78, No. 8; case of the Chemin de fer de Sceaux.

"Attendu que par leur nature de voie publique les chemins de fer ne sont point susceptibles de propriété privée. Qu'il est impossible, en effet, d'admettre qu'une telle voie crée pour l'utilité de tous, puisse etré soumise aux modifications partielles ou totales que subit la propriété privée, modifications qui résultent de ventes, donations, expropriations, &c. Que la destruction de la moindre parcelle d'un chemin de fer détruirait la totalité de la voie, ce qui serait de la plus évidente opposition avec la création meme du chemin," &c.

It is so with canals:

"Attendu que ces sortes d'établissements étant placés dans le domaine public sont naturellement inaliénables et mispresciptible, tant que la destination du fonds n'a pas été légalement changeé."

3. Prudhomme Domaine Public, pp. 146, 147.

4. As to the appointment of a *séquestre*, which was demanded by the plaintiff, the old French law did not specify the cases where such an officer should be appointed. It was left to the discretion of the judge.

Ordinance of 1667, Tit. 19, Art. 1.

The modern Code, Art. 1961, specified three classes of cases in which a *sequestre* might be appointed, but the opinion of the best commentators was, that even the code did not restrict the appointment to these cases.

3. Delvincourt, p. 436, No. 4.

L'Article 1961, n'est pas restrictif; la cour peut ordonnée le séquestre chaque fois qu'il le juge convenable pour la sureté des parties ou la decision dela cause.

The rules laid down in the code about the *sequestre* do not

deviate from those followed before the code, as shewn by the discussion of the code in 15 Locié, p. 192, where it is said:—

"Dans une matiére ou les principes sont posés depuis longtems, il s'agit non de creér des régles, mais de les recueillir."

And at p. 141, Favard says, "Vous n'avez remarqué aucune disposition nouvelle, les lois anciennes sur la matiére sont l'expression de la morale publique."

Under the application of these rules numerous cases of the appointment of a *sequestre* were to be found both before and since the code. Troplong, "Du depot et du sequestre," No. 267. Dalloz, Recueil Periodique, 1834, part 2, p. 101, where a *sequestre* was appointed to the seizure of real and personal estate and only maintained in appeal, as to the real estate and the *meubles par destination*.

9. Duparc Poullain, p.p. 160, 164. Dalloz Recueil Periodique, 1849, part 4, p. 47. Order, placing a railroad from Paris to Sceaux under a *sequestre*. Dalloz Recueil, Périodique, 1852, part 1, page 272. Judgment, shewing the effect of the appointment of a *sequestre* to the railroad from Marseilles to Avignon, with regard to the possession of the company. 1 Teulet, p. 620, No. 26.—"Le sequestre judiciaire d'un immeuble peut être nommé sur la demande des créanciers inscrits, surtout lorsquel' immeuble se trouve entre les mains d'un tiers, à titre d'antichrése. En ce cas les creanciers ont le droit de acclamer le sequestre soit pour la conservation de leur gage soit pour que les revenus soient percus dans leur intèrèt." J. Pal. Bourgés 8 Mars, 1822. 5 Dolloz, Jurisprudence du Royaume. Vo. Depot. and Sequestre, p. 78.

Mr. *Dorion* then cited the several cases in which *sequestres* had been appointed by the courts in the district of Montreal. The first was that of *Des Riviéres* v. *Ayer*, No. 1206, judgment of 6th April, 1825, and 20th Feb., 1826. In this case a *sequestre* was appointed to take possession of a land claimed by a petitory action, so that no waste should be committed pending the action by the defendant, who was nevertheless maintained in the possession of a mill erected on the property. Fabre dit Montfenant v. Chevalier. Judgment

rendered in May, 1845. Where on the suggestion of experts named in the case, a *sequestre* was appointed with special power to lease the property of which the defendant had only the usufruct, and to hand over a portion of the proceeds to the plaintiff in deduction of her claim, and the remainder to the defendant for his support.

Mr. *Dorion* next cited Hart v. Molson, 27th May, 1851, where a *sequestre* was named to receive an estate given up by executors, and to sell the property and carry out the provisions of the will. He continued:—The power of the court to grant the remedy sought for by the plaintiff was indisputable. The Superior Court had all the judicial powers of the old French courts, namely, of the *Conseil Superieur* of Quebec. It was bound to render such judgments between the parties as would meet the justice and equity of the case; it was not bound to any particular form of remedy as could be seen by a passage from Argon, which he cited.

In the case before the court, he submitted that from the nature, extent and situation of the property of the defendants, as from the various public and private interests connected with it, the remedy sought for should be granted. The ordinary remedy of selling the property at sheriff's sale could not be applied; if it were, it would result in the utter ruin of all interests concerned. The appointment of a *sequestre*, the powers and duties of whom would be similar to those of a receiver in England, was the only adequate remedy which could be applied. It would protect the rights of all parties, secure the proceeds of the road to the creditors entitled to them, and carry out the intention of the legislature.

SECOND DAY.

24TH OCTOBER.

Mr. RITCHIE for the defendants urged the following points:

1. That the plaintiff was not in a position to claim the remedy sought for. He should have shewn that the exception referred to in the act 1849, section 1, did not apply. That act provided that "the province shall have the first

hypothec, mortgage and lien, upon the road tolls and property of the company, for any sum paid or guaranteed by the province, excepting always the hypothec mortgage or lien of holders of bonds or other securities, on which interest is guaranteed by the province for the principal so guaranteed, and the principal on which it shall accrue." Again by the act of 1856, it was a condition that the £2,000,000 sterling of bonds should be applied in proportions, settled by that act, to the Victoria Bridge, and the different portions of the "Grand Trunk" road detailed in the statute. He contended that it fell upon the plaintiff to shew that this condition had been complied with: that the plaintiff should have proved that the road had been completed and the moneys applied to the road in the proportions indicated, but he had not done so. So with the act of 1857, the province was to forego interest on certain conditions, as to the completion of the work and the supply of sufficient plant to work the road efficiently.

Mr. *Justice Monk.*—To have done this would have involved a vast amount of evidence, and in fact it is scarcely possible that the plaintiff could have given it.

Mr. *Dorion.*—These things had all to be done by the defendants, who were also the parties issuing the bonds—that the very fact of their having issued, must be taken as proof that all necessary acts had been performed—at any rate the defendants could not take advantage of their own wrong.

Mr. *Justice Monk.*—What is the plea?

Mr. *Dorion.*—The general issue.

That the provincial government, and the various classes of creditors, should have been brought into the cause; their respective rights could then have been discussed, and settled by the court, whereas in this proceeding their rights might be interfered with without their being heard.

That the second preferential bondholders were on an equal footing with the first preferential bondholders under the statute of 1858, which enacts and provides (section 3) for the increase of the company's capital and enacts that "the further capital, so authorised, may be raised by preferential bonds, which shall be deemed to be preferential bonds, within

the meaning of the said recited act of the 19 & 20 Vic., ch. 111, and of the act 20 Vic., ch. 11, and such bonds, together with the preferential bonds already issued under the authority of said acts, shall be entitled to the privileges conferred on preferential bonds by the said acts."

That the plaintiff had not produced the bonds which he claimed to hold, and had not shewn that he was a bondholder. The coupons might belong to any one not a bondholder; although he at the same time contended that the coupons were not legally transferred by delivery without delivery of the bonds. On this point he referred to the act of 1854, ch. 83, sect. 19, "any party entitled to any debenture of this province, issued to the company, or to any bond or debenture of the company on which the whole amount shall have been paid up, may transfer his right and interest in any such bond or debenture, and in the principal and interest moneys secured thereby, to any other person by the delivery of such bond or debenture with the coupons or interest warrants attached thereto, without the necessity of a deed or instrument in writing for the purpose of effecting such transfer."

That the interest of the plaintiff was too small to enable him to obtain the remedy sought for. He was a creditor only for a half year's interest. It appeared from the petition that the company was indebted to the extent of millions of pounds sterling. How could he hope to control or interfere with such vast or large interests as were involved?

That the court had no power to appoint a *sequestre* or receiver in a case like this.

The cases known to the law where a *sequestre* could be appointed were, where there was litigation between parties as to some object, and their rights as to possession were easily balanced. In these cases the court would appoint a *sequestre*, but only during the pendency of the suit. The remedy sought by the plaintiff was entirely unknown to the old law. No case had been cited of a *sequestre* being appointed to a corporation under the old French law, although numerous trading as well as religious corporations, were then in existence. The modern code of France even

if it could support the pretensions,—which he did not admit,—of the plaintiff, was not applicable to this case.

The case cited by Mr. *Dorion*, in which the plaintiff had been allowed by the court to take a piece of land at a valuation in deduction of his claim, and without sale by an officer of the court, was not applicable, and might be classed amongst the ordinary remedies of the court. Mr. *Ritchie* then cited the following authorities: Ordonance of 1667, Tit. 19, vol. 1 of Ed. and Ord. p. 153, this contains the text of the whole law upon the subject. The commentators specified the different cases in which the *sequestre* is named. He can be appointed either "*d'office*" or upon the request of the parties. "On l'ordonne d'office principalement dans les matières de complainte, soit civile, soit bénificiale, lorsque les parties n'ont pas un droit plus apparent l'une que l'autre." Upon the request of the parties, "lorsqu'il y a plusieurs prétendans droit á la proprieté d'une chose, sans que l'un ni l'antre aìt la possession annale en sa faveur." Guyot's Rep. Vo. *sequestre.*

That the object of the appointment of a *sequestre* was to place the possession of property which is in dispute between two litigants, in the hands of a third party, *pending the contestation.* 1 Jousse sur l'Ord. 1667, Tit. 19, Articles 2, 8, 21; Pothier Proc. Civile, ch. 3, Art. 2, *Des Sequestres*, sec. 1, 2, 4, 5. Ancien Denisait, Vol. *Sequestre*, Ancien Merlin, Vol. *Sequestre*, Ancien Guyot, Vol. *Sequestre*, Ferriere Dict. de droit, Vol. *Sequestre.* 2 Pigeau, Liv. 2, part I, Tit 2, ch. 4; 2 Pigeau Liv. 2, part II., Tit 1, ch. 1; 2 Pigean, Liv. 2, part III., Tit 2, ch. 2. The *sequestre* was only named in cases of disputed possession or proprietorship, or in possessory or petitory actions where there was danger of the party in possession dissipating or injuring the property; never in respect of property merely hypothecated (the remedy in such case being now a *contrainte par corps*—See Consol. Stat. L. C., p. 466, ch. 47,) nor in respect of property of corporations, the possession in such case being in the ordinary officers of the corporation.

In order to strengthen their case the counsel for the plaintiff had raised a great many difficulties as to the inaliena-

bility of railways. Now by the Railway Clauses Consolidation Act, 14 & 15 Vic., ch. 51, sec. 9, under the heading "powers," it was enacted that railway corporations should have power "to purchase, hold, and take of any corporation or person, any land or other property necessary for the construction, maintenance, accommodation, and use of the railway, and also to alienate, sell, or dispose of the same." The company, therefore, as he contended, might sell the road, and the argument for a receiver founded on the inalienability of the railroad fell to the ground. Besides the rights of a *bailleur du fonds* were reserved, and one of these rights was to sell the property hypothecated, and it would be but a mockery for the province to provide for the issue of bonds, and to take away the remedy by sale from a creditor.

As to the "rolling stock" being *immeubles par destination*, any one who had listened to Mr. *Dorion's* argument might consider it conclusive; he, Mr. *Ritchie*, would not admit that it was absolutely conclusive, but if his pretensions, as to the appointment of a *sequestre* were equally well made out, he would think that the rights of the company were in considerable danger. But if these pretensions were made out, he would fall back to the point that the mortgage of the preferential bondholders was only upon the "tolls and profits" of the company. The interest of the act of 1859, was, as he contended, a charge only upon the tolls and profits, and this view was confirmed by reference to the statute of 1857, by which the province conditionally postponed its claim for *interest* "until the earnings and profits of the company should be sufficient to defray"—first, working expenses, then the rent of the Atlantic Railroad Company, and all interest on the company's bonds therein mentioned; and also by the statute of 1858, which provides for the application of the company's "earnings" after deduction of working expenses—first, towards the payment of the interest of the preferential bonds.

In the next place, he contended, the court could not withdraw the road from the management and control of the directors appointed by the legislature. Their powers were defined by the Railway Clauses Consolidation Act, sec. 16, (sub-sec. 22,) and must be respected by the court.

Again, the railway ran through four or five different jurisdictions, and it would be impossible practically for a receiver named by this court to manage it. There would be a conflict of authority, and the road would soon come to a stop. Nor was there any machinery by which the courts in Lower Canada could see that the receiver got proper instructions. In Upper Canada, the Court of Chancery was supposed to be in session daily, but here the judges could not act out of term, and in the long vacation exigencies might arise on which the instructions of the judges might be absolutely necessary. Wages must be paid, and broken bridges repaired. How could judges in vacation give directions on such matters which required dispatch? A person appointed to receive the funds would be merely a cashier, and would have none of the powers of a *sequestre* as known to our law.

Mr. *Justice Monk*.—There is hardly any conceivable position in which the Grand Trunk may be placed, unattended by difficulties, but I apprehend the court can give such directions as to enable a receiver to properly perform his duties, supposing the court comes to the conclusion that it has the power of appointment.

The legislature had appointed a particular remedy applicable to a case, which the plaintiff had not shewn to be his. By the act 16 Vic., ch. 41, amending the act incorporating the "Toronto and Guelph Railway," it is enacted, sec. 4, "that if the Canada Company shall neglect for sixty days after notice in writing by the holder of any such security, to enter into possession of the said railway, or appoint a receiver of the rates and tolls, and other profits of the said railway and works, under and by virtue of the aforesaid mortgage, then in such case the holder of such security (without prejudice to his right to sue for the interest or principal so in arrear, in any of the Superior Courts of Law or Equity,) may, if his debt amounts to the sum of £5000, "require the appointment of a receiver by an application to the Court of Chancery, at Toronto, &c." The road referred to in this act formed part of the "Grand Trunk Railway," but the plaintiff was not a creditor

to the extent named, and had not brought himself within the remedy contemplated by law.

The petition complained of the misapplication of tolls to what was not working expenses. This was not proved, nor could it well be proved since the statute of last session, 24 Vic. ch. 17, sec. 8, enacted that "the interest of the purchase money or rent of any real property acquired or leased by any railway company, and necessary to the efficient working of such railway; and the price or purchase money of any real property or thing without which the railway could not be efficiently worked, shall be considered to be part of the expenses of working such railway, and shall be paid as such out of the earnings of the railway."

Mr. *Justice Monk*.—I suppose, Mr. Ritchie, the first and second preference bondholders concurred in that?

Mr. *Ritchie*.—Why, they may be supposed to have done so, since my two learned friends, (Messieurs. *Drummond* and *Dorion*) were at the time members of the legislature.

Mr. *Drummond*.—The fact is, that clause was stealthily thrust into the bill in the Upper House, and in so singular a manner, as to have called forth a petition to the Queen to disallow the act.

Mr. *Ritchie*.—This act gave the largest power as to the application of the revenues and tolls, and the argument founded upon improper expenditure in working expenses fell to the ground.

In the course of Mr. *Ritchie's* argument, Mr. *Justice Monk* enquired whether the defendant's best answer to the action would not have been to pay the interest claimed, some £300, to which Mr. *Ritchie* replied, undoubtedly it would, but unfortunately the directors were not in a position to do it consistently with the responsibility they were under to work the road.

Mr. *Pominville*, for the defendants, followed, and confined his remarks to that part of the case which related to the power of the court to name a *sequestre*, and to a review of the authorities on that point cited by the counsel on both sides. He also cited Troplong "*Sequestre*," p. 202, 210; 3 Tracharicæ, p. 119; Guyot vol. "*Sequestre*," p. 244.

THIRD DAY.

OCTOBER 25TH, 1861.

Drummond, Q. C., in reply, admitted that the petition was a novel one in its application to railway property, but there was nothing novel in its principle; and contended that the law of Lower Canada was not founded upon precedent but on principles which might be expanded to meet every advance of society, and every new species of property. Dupin had stated, "That in the new French code there was no *casus omissus*." So the Lower Canadian courts had the amplest power in the application of the general principles of the civil law, so as to give remedies in every conceivable case. This was too often overlooked. English proceedings had been introduced into the province at a very early period, naturally enough by the gentlemen of the profession who were best acquainted with the English system, and thus the French remedies had been overlooked. He recollected making an application to a judge for affixing of the seal of the court *scellé*, and was then told there was no such remedy, but, on consultation, the judges had granted the remedy, and in an hour property of great value in a hotel of indifferent repute, was placed under seal, although left by a stranger who had died suddenly without friends or relatives, or even creditors in the province. The *sequestre* was well known to our law, and the 19th title of the ordinance of 1667 was in full force, being registered at Quebec, 23rd October, 1679, with only a single addition, in these terms: "Sur le dit titre (19), que les amendes seront reglées par les juges, a cause de la pauvrété des habitans du pays." That, even if it were not, this would be a case for appointing one *ex necessitate* to save the large interests involved,—to preserve the security of all classes of creditors, and to ward off the destruction of the property. The court could grant the remedy not as a legislator but under the plainest principles of our law.

He contended that the court had all the powers of a court of law and of a court of equity, and that every day the exercise of such equitable jurisdiction became more and more

evident and beneficial; so that in his opinion the equity and not the strictly legal jurisdiction of the courts should be exercised.

He then commented on the statutes concerning the provincial lien, and contended that language had been exhausted in creating it; that the rights of the preferential bondholders were before and over those of the province, and over-riding them. What preferential creditors were, every body knew. Here they had advanced money to complete the undertaking; they were like the builder of a house who had a special privilege to the extent of the *plus* value added to the soil, even before a previous hypothecary creditor; that they had a *hypotheque* on the soil, and on every part of the undertaking, including all plant and rolling stock. When these bonds were being taken up, the company cried them up; they were said to be as good as the Bank of England—to be protected by the government guarantee, and to have a first lien over every thing; now the company repudiate every thing, and insist that preference and priority mean nothing; that preferential bondholders are in a worse position than common creditors having only a right to be paid out of the tolls and profits of an undertaking so deeply embarrassed that any judgment creditor on a debt of yesterday might practically ruin their security, or force them to make terms by buying up their judgments. Such a construction of the statutes, he contended, could never be entertained by any court of justice.

He did not think the objections raised by the defence entitled to very much consideration, but would allude to them *seriatim*. The plaintiff, it was said, could not claim the remedy on account of the exception in the Act of 1849, sec. 1, and because he had not proved compliance with the conditions (so called) as to the completion of the road. What an argument for the company to make! "You, a creditor, must shew that we, the company, complied with the law; that we expended the proceeds of the bonds as we were directed by the statute, and that the moneys which came into our chest from yours, were not misapplied or diverted by us before you can have any remedy or even a valid debt. We, by our

plea deny every thing, and you must prove every thing." As to the exception in the Act of 1849, it meant this: The province will not insist on priority over bonds which the province had guaranteed, but would rank rateably, being bound to pay the moneys guaranteed, which, if paid directly to the bondholder, would dimimish the liability of the province *pro tanto*.

Next, as to the necessity of calling in the government and all the various classes of creditors into this action, it was entirely contrary to our mode of procedure. The rights of no creditor could be sacrificed. Any one could come and dispute even the plaintiff's debt and shew he had a superior right, and the court would at once apply the remedy. The judgment here would be legally conclusive against defendants; it was *res inter alios* to all the world besides, and if any other creditor or party interested came and complained of the appointment of a receiver, or of his acts, or omissions of duty, when appointed, the court would listen to him. A decision, however, on the main points as to the existence of priority, and as to the extent of the lien, would be most valuable, and would no doubt guide the various classes of creditors. It would settle the law for Lower Canada so far as a judgment in this court could settle it.

It was said the bondholders under the act of 1858, have only the same rights and privileges as those under the act of 1856. Even if this were true, what does it make out for the defendants? It would simply be putting a second class creditor up into the first class. It would not lessen the legal remedies of a first class bondholder, although it might diminish his receipts, if the fund were found insufficient to pay all.

Next came the objection as to the coupons. The plaintiff was told by the company, "you hold coupons—you say you hold the bonds. But you may be a holder of coupons without being a bondholder. You should have produced and filed the bonds as well as the coupons, and then you would have proved that you held the coupons legally, which we deny, as we deny every thing." The best way to destroy

an argument of this kind was to recur to what was further contended for by the defendants, namely, that the statute enacted that the bonds and the coupons could only be transferred together, and to the fact that the coupons formed part of the debentures. But it was scarcely necessary to dwell on a point like this. He would, however, refer to the interrogatories on *faits et articles*. The company, when asked on interregatories whether the £2,000,000 of preferential bonds were issued under the act of 1856? answered, yes! "Were these debentures issued and duly signed on behalf of the company with numbers corresponding with those on the coupons produced in this case?" Yes! "Are you not indebted to the plaintiff in the interest due in January 1861?" Yes! "Is plaintiff not the holder of the debentures?" No! They will not admit that they are ignorant of this, although they say they admit they treated with him, "on the supposition he was the holder of them." The court will no doubt adopt that "supposition" also, and will hold that there is sufficient proof that the plaintiff was and is the real holder of them, and also that the company might well have answered on oath with a little less precaution, without materially injuring their cause.

But, it was objected, the plaintiff's debt was too small, only half a year's interest! The plaintiff, no doubt, thought it was quite large enough, and likely to become too large. There was the interest due last July, and another half year's interest would accrue in January; and there was the principal of the debentures too, "on the supposition" that the plaintiff was the holder of them. It was true these sums were small, compared with the whole indebtedness of the company, but not so small as to induce the court to refuse the remedy applied for; if that remedy should be found to be warranted by law, and likely to be beneficial to all parties. The object of the plaintiff was to prevent the sacrifice of the road, and expressly of the rolling stock, upon which he claimed a lien. To preserve the road was the true interest of all the preferential creditors, and indeed of all classes of creditors, who can only be paid from the working of the road with efficiency. They wished to keep the rolling stock on the line, and did not

wish to sell the road, if they could. The argument of the opposite counsel seemed to him scarcely to suit the position of the company or the duties of the directors. They said, and counsel in this court have repeated, "you can sell the road; you have the usual recourse through the sheriff and by opposition *à fin de conserver;* therefore there shall be no receiver." In France the railway company of Sceaux came and said, we are unable to run the road, we are losing at the rate of 10,000 francs a month, give us assistance or name a *sequestre*, and a *sequestre* was named. Here the company adopted a different view, but perhaps not so wise a course. It was for the court to determine whether it would adopt this remedy of selling the road by the sheriff, which he thought was even worse than the disease, or provide for the interest of all classes of creditors by affording them means of ascertaining and controlling the management and expences of the company by a *sequestre*, under the direction of the court. The *sequestre* was really for the benefit of all parties, shareholders and creditors alike.

It was urged that there was no evidence of the company being in embarrassed circumstances, and *en deconfiture*. The court would find in the record the depositions of Mr. Elliott, the company's secretary and treasurer, and of Mr. Hardman, their auditor, where they verify and refer to the elaborate statements to be found under their signatures in the recent report of the Government Commissioners, a copy of which is filed in the case. The bad position of the company, as to its finances, would be but too apparent from these statements. In addition to this the company examined on *faits et articles* admit that the interest on the bonds had fallen into arrear; that there were no funds in the hands of their London bankers to pay the interest due in January last, and that they were unable to pay their debts from the earnings of the road; and when asked by the interrogatories what was the amount of their liabilities, say that they amount to £2,196,500, apart from the judgments referred to in the interrogatories.

These judgments are those of Messrs. Baring & Co., and Glyn & Co., obtained in this court, copies of which were filed with the petition. In addition to this, a copy of judg-

ment in favour of Peto & Co. was produced at the argument, so that the company owes—

Per company's statement.....	£2,196,500
Judgment, Baring & Co.....	396,476
Judgment, Glyn & Co.....	407,051
	£3,010,027
If Peto's judgment, rendered in this court since the filing of this petition, be added.....	340,176
We have a debt of...	£3,350,203

The sixteenth interrogatory is in the following terms:

"Is it not true that the said company is insolvent *en deconfiture?*"

Answer. "The answer to this interrogatory appears to depend upon a conclusion of law, which would have to be formed upon the proof of facts which might, in law, be held sufficient to establish insolvency, and the question is one they are therefore unable to answer."

He was sorry that the directors, before they put such an answer upon record, had not taken the advice of counsel as to what was meant by insolvency and *deconfiture.* They might then have been able to answer with more frankness. The learned counsel who opened the case for the defence, said that if the interrogatory in question had been put to him in the street he might have answered in the affirmative; but that there was really a question of law involved in it. Perhaps there was, and he would leave it to the court. He thought a *sequestre* should be named, if it were only to relieve the directors from their sad state of perplexity; and yet when they applied to parliament for aid, when they got an advance last winter from the government, they seemed to be in no doubt as to the legal question, which now causes them such embarrassment. *Then,* the company was admitted to be embarrassed, but *now* it is a legal question! and small objections are raised, which he thought might better have been omitted altogether, although the raising them could be of no kind of real advantage to the company.

Mr. *Drummond* then commented upon the pretension that by the statute relating to the Guelph company, there must be a debt of £5,000 before a receiver could be appointed, and

submitted that that was a special remedy given to a special creditor under that act, and was not at all applicable to the Grand Trunk Railway Co., as the court must see on reference to the statute.

Reference was then made by Mr. *Drummond* to the act of last session as to what was to be taken to be working expenses. The circumstances under which this clause was put into the act were but too well known, but he would not allude to them. The clause stood on the statute book, and must be construed like the other clauses in the act. He submitted to the court that the clause was not retro-active—that it ought not to be so construed as to secure impunity for the directors of the company in expenditure made for foreign lines of road, or for hotels, stations, docks, or other expenditures but working expenses. It was not unlikely that the directors supposed the clause would be what might be called a "whitewashing clause." If they did, it would furnish the strongest argument possible for the intervention of this court, and the appointment of a *sequestre*. For it would be an attempt to alter the position of creditors by *ex-post facto* legislation, and to ward off the responsibility which attached to all directors in case it were found that they had gone beyond the law.

He further contended that there was ample proof in the record that the rights of the preferential bondholders were in peril. There were judgments filed in this record obtained first in Upper Canada and next in this court. What was to prevent a seizure of the rolling stock and the interruption of traffic? and if that were done in one district, it might be done in every district, and the preferential bondholders would have to file oppositions to each execution, and debate their rights at unnecessary cost.

Another objection was urged for the defence, that the road being an entire work, and running through various jurisdictions, his Honour could not effectually secure its being properly worked by a *sequestrator*. It was said "your jurisdiction extends only to the district of Montreal." On this latter point he differed from the counsel for the defence. The court was not a court for the district of Montreal, but for Lower Canada. Writs run from one end of the province

to the other. A judge from Montreal may sit in Gaspé, or any other part of the lower province. But still it is said there is the difficulty as to the road being partly in Upper Canada. Shall the Court of Chancery in Upper Canada appoint a receiver, and the Superior Court here a *sequestre*? What if there should be conflict? These were most serious questions. The legislature had not settled them, but if preferential creditors had a clear right to a receiver or *sequestre*, the courts were bound to find a remedy. Would not comity lead to co-operation between the two courts? Was a conference between them impossible? Might not the same party be named by consent of the litigants of the company? Might not the company drop all their small objections, and come forward and acquiesce in a remedy which would protect the company from the creditors whose suits were pending in this court, and from the many others who might institute proceedings? However this might be, the court at all events could take the first step, and there might not occur so much difficulty as to prevent a receiver or receivers from being as useful and efficient in Lower Canada as elsewhere.

Mr. *Drummond* concluded by saying: I would lastly urge upon your honor the propriety of giving judgment on as early a day as possible. We all know that very important interests are at stake. Your honor must see that whatever your decision may be, the case will be taken to the appeal court by one party or the other. This case is not only attracting the attention of the whole province, but of the leading capitalists in England as well; and I think it would be well to enter upon a new era, as it were, in our jurisprudence, that we may know what our rights are, and how the principles of the law will be carried out by the courts. It should not be said that we have made progress enough. No, there are many things which remain to be done, and if we have reached our present position as a colony, it has been more through the capital and the influence of the leading men of England than of ourselves, and we should not allow these men to be baulked and deprived of their rights by such a paltry defence as that raised in this action.

Mr. *Justice Monk* intimated that he would be prepared to give judgment on the 1st day of next term, Nov. 18th.